

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL GARCIA, :
Petitioner, : 07 Civ. 2535 (PAC)(AJP)

- against - : **OPINION & ORDER**

ISRAEL RIVERA, :
Respondent. : ----- x

HONORABLE PAUL A. CROTTY, United States District Judge:

Pro se petitioner Michael Garcia (“Garcia”) seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his January 2004 conviction and February 2004 sentence, following a bench trial, for second degree attempted assault, third degree criminal possession of a weapon, third degree criminal mischief, three counts of third degree assault, three counts of endangering the welfare of a child, and aggravated cruelty to animals. Garcia asserts five claims for relief from his conviction: (1) that the trial court abused its discretion as a matter of law by sua sponte considering attempted second-degree assault as a lesser included offense of attempted first-degree assault; (2) that the conviction of aggravated cruelty to animals violates due process; (3) that proof of third-degree criminal mischief was insufficient; (4) that he was improperly adjudicated as a second violent felony offender; and (5) that the sentence imposed is excessive and should be reduced in the interests of justice.

This case was referred to United States Magistrate Judge Andrew J. Peck, who issued his Report and Recommendation (“R & R”) on August 16, 2007, recommending the denial of Garcia’s petition. The Magistrate Judge provided ten days for written objections, pursuant to Federal Rule of Civil Procedure 72(b), and specifically advised that the “failure to file objections will result in a waiver of those objections for the purposes of appeal.”(R & R 38). No objections have been filed.

DISCUSSION

“To accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” Wilds v. United Parcel Serv., 262 F.Supp.2d 163, 169 (S.D.N.Y. 2003). As described more completely in the R & R, Garcia has not shown that his conviction and sentence were contrary to, or an unreasonable application of, clearly established federal law. See 28 U.S.C. § 2254(d). The Court agrees with Magistrate Judge Peck’s determination that neither Garcia’s conviction nor his sentence violated the Constitution or laws of the United States, and finds no error in Magistrate Judge Peck’s report. Accordingly, the Court accepts and adopts the Report and Recommendation as its opinion, and Garcia’s petition for a writ of habeas corpus is DENIED.

I decline to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). The petitioner has not made a substantial showing of a denial of a federal right, and appellate review is therefore not warranted. Further, Garcia did not file objections to the Report and Recommendation, as he was required to do in order to preserve his right to appeal. Pursuant to U.S.C. § 1915(a)(3), I also find that any appeal from this order would not be taken in good faith.

CONCLUSION

The Clerk of Court is directed to enter judgment and close this case.

Dated: New York, New York
February 12, 2008

SO ORDERED


PAUL A. CROTTY
United States District Judge

Copies Mailed To:

Michael Garcia
04-A-1214
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

Via E-mail To:

Ashlyn Dannelly
Assistant Attorney General
State of New York
Office of the Attorney General
Federal Habeas Corpus Section
ashlyn.dannelly@oag.state.ny.us

Via Interoffice Mail To:
Judge Andrew J. Peck, United States Magistrate Judge